

A **MOTILAL REALTY SDN BHD**

v.

SUNLITE TEXTILE SDN BHD

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDULL HAMID EMBONG JCA
HELILIAH MOHD YUSOF JCA
C [CIVIL APPEAL NO: W-02-982-2006]
C 7 OCTOBER 2008

***CIVIL PROCEDURE:** Appeal - Adducing fresh evidence - Filing of supplementary appeal record containing further evidence - Whether ought to be excluded - Preclusion from adducing further evidence - Jurisdiction of court - Merits of application*

***EVIDENCE:** Fresh or further evidence - Adducing of - Filing of supplementary appeal record containing further evidence - Whether ought to be excluded - Preclusion from adducing further evidence - Jurisdiction of court - Merits of application*

E The appellant, granted leave to adduce further evidence by way of an affirmed affidavit by virtue of an order of this court dated 28 August 2007 ('said order'), filed a supplementary appeal record containing the further evidence. The respondent sought to have the supplementary appeal record excluded and to preclude the appellant from adducing the further evidence in question. The respondent's complaint was this. The appellant ought to have simply filed in the further evidence, which would have enabled the respondent to file its rebuttal evidence. By filing the affidavit by way of a supplementary appeal record the appellant had not properly before the court and ought to be excluded.

Held (dismissing the respondent's application)
H **Per Gopal Sri Ram JCA delivering the judgment of the court:**

(1) The point taken by the respondent was without any merit. The appellant was indeed given leave to adduce further evidence, the precise nature and form of which was identified by the said order. The fact that the appellant chose to

I

produce the further evidence by way of a supplementary appeal record had not prejudiced the respondent in any way since it was only a matter of form and not substance and nothing turned upon it. The respondent ought to have filed its rebuttal evidence instead of filing the present motion. As for the second order, what the respondent sought to do was to have this court reverse the said order. This court, of course, had no jurisdiction to do any such thing. The facts were that the respondent did apply to the Federal Court seeking leave to appeal against the order in question, which application was dismissed with costs. The present motion was filed after that dismissal no doubt as an attempt to set aside the said order. For the reasons already given, the respondent's application was frivolous and vexatious and devoid of any merit. (paras 2, 3, 4 & 5)

A

B

C

D

Bahasa Malaysia Translation Of Headnotes

Perayu, yang telah diberi kebenaran untuk mengemukakan keterangan lanjut melalui suatu affidavit yang disahkan oleh sesuatu perintah mahkamah ini bertarikh 28 Ogos 2007 ('perintah tersebut'), memfail suatu rekod rayuan tambahan yang mengandungi keterangan lanjut tersebut. Responden memohon untuk rekod rayuan tambahan tersebut dikecualikan dan untuk perayu dihalang dari mengemukakan keterangan lanjut berikut. Aduan responden adalah macam ini. Perayu sepatutnya memfail keterangan lanjut itu, yang akan membolehkan responden memfail keterangan pematahannya. Dengan memfail affidavit melalui suatu rekod rayuan tambahan perayu tidak mematuhi perintah tersebut. Oleh itu, rekod itu tidak betul di hadapan mahkamah dan patut dikecualikan.

E

F

G

Diputuskan (menolak permohonan responden)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1) Perkara yang dikatakan oleh responden tidak mempunyai apa-apa merit. Perayu memang telah diberi kebenaran untuk mengemukakan keterangan lanjut, yang mana sifat dan bentuk tepatnya telah dikenal pasti oleh perintah tersebut. Fakta bahawa perayu memilih untuk mengemukakan keterangan lanjut melalui rekod rayuan tambahan tidak memprejudiskan responden dengan apa cara pun kerana ia hanya perkara berkaitan dengan bentuk dan bukan isi dan tiada apa-apa yang

H

I

- A bergantung ke atasnya. Responden sepatutnya memfail keterangan pematahannya dan bukan memfail usul ini. Mengenai perintah kedua, apa yang responden cuba buat ialah untuk menyakinkan mahkamah ini mengakaskan perintah tersebut. Mahkamah ini, sudah tentu, tidak mempunyai
- B bidangkuasa untuk membuat perkara seperti itu. Fakta-faktanya ialah bahawa responden telah memohon ke Mahkamah Persekutuan untuk meminta kebenaran untuk merayu menentang perintah tersebut, di mana permohonan tersebut ditolak dengan kos. Usul terkini telah difail selepas tolakan
- C tersebut tanpa ragu-ragu sebagai suatu percubaan untuk mengenepikan perintah tersebut. Untuk sebab-sebab yang telahpun diberi, permohonan responden adalah remeh dan menyusahkan dan tanpa apa-apa merit langsung.
- D **Case(s) referred to:**
The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H Narayanaiah AIR [1976] SC 2403 (refd)
Sheo Shankar Prasad Sinha v. State of Bihar AIR [2003] Pat 30 (refd)
For the appellant - Ramdas Tikamdas; M/s Siva Ram & Assoc
For the respondent - Amarjeet Singh; M/s TK Wong, Tan & Assoc
[Appeal from High Court, Kuala Lumpur; Originating Summons No: S6-24-1015-2006]
Reported by Suresh Nathan
- F

JUDGMENT

Gopal Sri Ram JCA:

- G [1] This is a rather large storm in a small teacup. The centre of the storm is the order of this court made on 28 August 2007, whereby the appellant was granted leave to adduce further evidence by way of an affidavit affirmed by one Mahesh Kumar
- H and dated 10 August 2007. What the appellant then did was to file a supplementary appeal record containing the further evidence. The respondent by a motion dated 31 October 2007 sought to have the supplementary appeal record struck out (I think what the respondent means is to have the record in question excluded)
- I and to preclude the appellant from adducing the further evidence

in question – although the actual words of the prayer in the motion are “that the appellant shall not be at liberty to adduce further evidence”.

[2] The respondent’s complaint appears to be this. The appellant was granted leave to adduce further evidence. It ought to have simply filed in the further evidence. This would have enabled the respondent to file its rebuttal evidence. By filing the affidavit by way of a supplementary appeal record the appellant had not complied with the order of 28 August 2007. That record was therefore not properly before the court and ought to be excluded. In my judgment, the point taken by the respondent is without any merit. The appellant was indeed given leave to adduce further evidence. The precise nature and form of the evidence was identified by the order of 28 August 2007. The fact that the appellant chose to produce the further evidence by way of a supplementary appeal record has not prejudiced the respondent in any way. For it is only a matter of form and not substance and nothing turns upon it.

[3] All that the respondent need have done is to have sought leave from this court to deliver its evidence in rebuttal. For, it is entirely consonant with the rules of natural justice that rebuttal evidence be admitted. See, *The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah* AIR [1976] SC 2403; *Sheo Shankar Prasad Sinha v. State of Bihar* AIR [2003] Pat 30. There is a conflict of evidence on whether the respondent did in fact make an application in that behalf. According to the evidence filed by the appellant, when this court made its order on 28 August 2007, counsel for the respondent did apply to file an affidavit in reply. This court however refused that application. Counsel concerned has filed an affidavit denying that any such thing happened. According to him, this court expressed no view on the respondent’s aforesaid application but left it to the respondent to do the needful to deliver its rebuttal evidence. Accepting the respondent’s version, it ought in my view, to have filed its rebuttal evidence instead of filing the present motion.

[4] As for the second order sought, what the respondent seeks to do is to have us reverse this court’s earlier order of 28 August 2007. This court, of course, has no jurisdiction to do any such thing. The facts are that the respondent did apply to the Federal

- A** Court seeking leave to appeal against the order in question which application was dismissed with costs. The present motion was filed after that dismissal no doubt as an attempt to set aside the order of 28 August 2007.
- B** **[5]** For the reasons already given, it is my judgment that the respondent's application is frivolous and vexatious and devoid of any merit. It was accordingly dismissed with costs to be paid in any event.
- C** **[6]** My learned brother Abdull Hamid bin Embong and my learned sister Heliliah bt Mohd Yusoff have seen this judgment in draft and have expressed their agreement with it.

D

E

F

G

H

I